FILE COPY

IN THE

Supreme Court of the United States

October Term, 1935.

No. 29

RICHEY V. GRAHAM,

Petitioner,

v.

THE WHITE-PHILLIPS COMPANY, INC.,

Respondent.

Certiorari to the United States Circuit Court of Appeals For the Seventh Circuit.

PETITIONER'S REPLY BRIEF.

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Petition for Certiorari Filed April 23, 1935.
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REPLY ARGUMENT.

I.

By calling attention to the case of *City National Bank v. Bank of the Republic, 300 Ill. at 106-107*, the respondent has made it plain to all concerned that the highest Court in the State of Illinois has adopted its own interpretation of the Negotiable Instruments Law without reference to any prior decisions or alleged claim as to what the law merchant was. The Illinois Supreme Court in this case, which respondent has cited, has set forth in the plainest possible terms that it will construe the act as it is written, and will give to the words their natural and common meaning.

Thereby, with due acknowledgment to the courtesy of the respondent in citing this case, we add it to the citations sustaining our Point 3 on page 18 of our original brief, so that we now present at least four different cases decided by the Supreme Court of Illinois as announcing the law of this State with reference to notice, viz.,

City Nat. Bank v. Bank of the Republic, 300 Ill. at 106-107;
The First State Bank v. First National Bank, 314 id. 269.
Foncannon v. Lewis, 327 id. 455-461;
Renfrow v. Kramer, 341 id. 398 at 406;

and

Northwestern National Bank v. Madison & Kedzie State Bank, 242 Ill. App. 22, writ of certiorari denied by the Supreme Court, 242 id. XIV.

Because on close analysis the case sustains our contention as to the effect of the service of the notice prescribed by the Illinois Statute, we add *National Bank v. Uptown State Bank, 273 Ill. App. 401,* and along with it the other cases that respondent fails to appreciate sustain our interpretation of the effect of the service of the notice prescribed by the *Illinois Negotiable Instrument law:*

Drouineau v. First National Bank, 244 id. 251;
Chicago Auto Sales Company v. Peters, 221 id. 363;
Cramer v. Burkhalter, 207 Ill. 34;
City of Decatur v. Beston, 169 id. 340;
Peterson v. Emery, 154 Ill. App. 294;
Knolt v. Cartwright, 202 id. 502;
C. R. I. & P. Ry. Co. v. Hamler, 215 Ill. 525.

II.

City Bank v. Bank of the Republic, supra, holds:

> "Illinois adopted the Negotiable Instruments Law in 1907.
>
> "It grew out of recommendations made by the Commissioners for Uniform Laws, in 1896, at which time these representatives of the various states recommended the uniform act, which has been adopted by at least 46 of the states since 1896."

Therefore, we claim that decisions prior to statutory enactment should not control where they are in conflict with the plain wording and intent of the subsequently enacted statute.

Thus our own Court, in the case above cited, says (p. 106-107):

> "The confused state of the law before the adoption of the Negotiable Instruments law would naturally bring some of its provisions in conflict with the statutes and decisions of the several States. In construing the act the language ought to be interpreted in such a way as to give effect to the beneficent design of the legislature in passing an act for the promotion of harmony in the law regarding negotiable paper. *THE COURT MUST TAKE THE ACT AS IT IS WRITTEN AND SHOULD GIVE TO THE WORDS THEIR NATURAL AND COMMON MEANING.* The law was enacted for the purpose of furnishing *in itself* a certain guide for the determination of all questions covered thereby relating to commercial paper and so far as it speaks without ambiguity as to any such question, *reference to case law as it existed prior to the enactment is more likely to be misleading than beneficial.* If the provisions of the act harmonize with the general

principles of commercial law in force before its enactment those principles should be followed, but if the language of the act conflicts with statutes or decisions in force before its enactment the courts should not give the act a strained construction in order to make it harmonize with earlier statutes or decisions. If this is done the very purpose of the act is defeated. In order to keep the law as nearly as may be uniform, the courts of all the States should keep in mind the spirit and object of the law and should give to the language of the act a natural and common construction, so that all might be more likely to come to the same conclusion."

THE LAW MERCHANT, being, as we interpret it, the consensus of decision pronouncements which came to be recognized as the common law, made the matter of the right of a holder of negotiable instruments to have the status of a holder for value turn on the question of knowledge—not of Notice.

When the various states chose to have the rights of holders of commercial paper defined by a statute, rather than by decision law or custom, they adopted a statute which made NOTICE the test, rather than actual knowledge, at the time of the taking of the paper.

While NOTICE can be an element of KNOWLEDGE, one can derive KNOWLEDGE from consciousness of conditions arising in other ways than from direct formal NOTICE.

The British, Federal and various State decision pronouncements and policies and doctrines, rendered prior to the date of statute enactments, must yield and give way to the plain intent and meaning of the wording of the statute, which is the governing and controlling factor in interpreting the facts involved.

Attention is called, with emphasis, to the frequent admissions and apologies by the respondent, involved in the citation of cases decided many years ago.

The respondent, we think, has signally failed in its efforts to justify an ignoring of the statutory law of the twentieth century by profuse quotations from English and American decisions of 1836, 1857 and later years in the 19th century.

Its brief also fails to note the difference between the reason for the rule that governmental currency is subject to a different rule than commercial paper in that currency has but one maker, one general design and definite series of amounts, while the latter has different makers, and payees, different dates of issue and maturity, and amounts and terms and places of payment—the latter being easily susceptible of detection, the former very difficult.

III.

Again the Respondent in the discussion of its Point B (page 12), misinterprets the decisions in both *Paine v. Sheridan Trust & Savings Bank, 342 Ill. 342,* and in *Northwestern Nat. Bank v. Madison and Kedzie State Bank, 242 Ill. App. 22.*

In the former case, no question of law was necessary to be passed on adversely by the Supreme Court, because, assuming that the higher Court was bound, as it was; by the finding of the Appellate Court as to what was the ultimate fact involved, it found itself in agreement with the Appellate Court as to what the law was as applied to such ultimate fact. The case turned upon the proposition, so the appellant claimed, that arriving

at the ultimate fact by the Court below involved principles of law the correctness of which the upper Court had the right to go into, in order to upset the ultimate fact finding. It was only by a reversal of the ultimate facts found, that the Supreme Court could disturb or reverse the decision of the Appellate Court. But the Supreme Court held that it was bound by the ultimate facts, as found by the Appellate Court, and it then laid down the law as applicable to those facts, which finding at the middle of page 349 is as follows:

> "Persons dealing with an assumed agent are bound, at their peril, not only to ascertain the fact of the agency but the extent of the agent's authority. They are put upon their guard by the very fact that they are dealing with an agent, and must, at their peril, see to it that the act done by him is within his power. (*Foster v. Graf, 287 Ill. 559; Merchants Nat. Bank v. Nichols & Shepard Co., 223 id. 41; Jackson Paper Manf. Co. v. Commercial Nat. Bank, 199 id. 151.*) This rule is particularly applicable where, as here, the agent is contracting in his own personal interest and to the probable detriment of his principal. (*Leigh v. American Brake Beam Co., 205 Ill. 147.*)"

And the Supreme Court followed its decision of the law of the case, on the facts presented to it by the ultimate facts found by the Appellate Court, by the ruling which appears on the last line of the opinion:

> "the judgment of the Appellate Court will be affirmed."

So too, the Supreme Court in the case of *Northwestern National Bank v. Madison & Kedzie State Bank, supra,* passed on the conclusion of law reached by the Appellate Court, upon the admitted, uncontroverted facts

in the case, and by its denial of the writ of *certiorari* in effect and in law said

"the judgment of the Appellate Court will be affirmed."

It should be borne in mind that the case of *Paine v. Sheridan Trust & Savings Bank, supra,* differed from the *Northwestern National Bank v. Madison & Kedzie State Bank case* in this, that the judgment in the Court below in the former case was reversed in the Appellate Court, on the facts, and final judgment on the latter Court's finding entered in that Court. In such cases, the Appellate Court is required, by statute, to "recite in its final order or judgment the facts found." *(342 Ill. at p. 247.)* But not so where the finding of the facts by the Appellate Court does not differ from that of the Court from which the case has been appealed.

In the case of *Northwestern National Bank v. Madison & Kedzie State Bank, supra,* the petitioner for the writ asked for the same upon the legal proposition that the legal conclusion of the Appellate Court, which it, (petitioner), said was

> "As a matter of law receipt by a bank on the 5th day of January, 1925, of a circular list of securities alleged to have been stolen—constitutes 'actual knowledge' within the meaning of *Section 56 of the Uniform Negotiable Instrument Act,* at a subsequent date, viz., May 9, 1925, of an infirmity or defect in the title of the person then negotiating some of such securities." (Petitioner's Brief 22.)

And the Appellate Court likewise defined the question involved and the conclusions reached in its decision when it set forth in its opinion (Petitioner's Brief, 23; Rec. 139-140).

"The real question, as we conceive it, is whether on the undisputed fact that defendant received said notice in the manner aforesaid it is chargeable with actual knowledge of the theft when it received the bonds • • •

"Being a corporation, defendant necessarily acted through its agents. Its knowledge must, therefore, be such as necessarily comes to one of its agents acting in the regular course of his duties • • •

"It becomes a question of law, therefore, whether or not his actual knowledge was that of the defendant corporation which must necessarily acquire knowledge, if at all, through its authorized agents.

"In this view of the case we think upon the undisputed evidence defendant had actual knowledge that the bonds were stolen, and as a matter of law was, therefore, not a holder in due course under the uniform *Negotiable Instruments Law.*"

The respondent has signally failed to divert the issue passed upon by our Illinois Courts that "Notice" constitutes "Knowledge" to its claimed proposition that the Appellate Court was simply deciding a question of fact as to what constitutes Notice. (Contention under B, page 12, Respondent's Brief.) The respondent by its citation of *Paine v. Sheridan Trust and Savings Bank, supra,* has tried, ineffectively we think, to demonstrate that the decision in *Northwestern Nat. Bank v. Madison and Kedzie State Bank, supra,* involved and turned on the consideration of litigated, disputed facts as to whether Notice had been proved; whereas in neither of these two cases were the facts questioned, but the Supreme Court in both cases accepted the fact as to Notice having been given, as found by the Appellate Court, as binding on it, and therefore not the subject of review. While in the *Northwestern Nat. Bank case* the facts were not in dispute in either the trial or the Appellate Courts, but on the contrary the petitioner for the writ of *certiorari*

was submitting the case to the Supreme Court upon the legal proposition that the Appellate Court had erroneously decided the question of law as to the effect of the Statutory provisions as to Notice arising from the admitted facts in the case as they were found by the trial and Appellate Courts.

IV.

What the Appellate Court decided in *Northwestern Nat. Bank v. Madison & Kedzie State Bank, supra,* and what the wording of the Illinois Statute makes incontrovertible is, that *Notice* constitutes *Knowledge.* Under the English cases, followed, in indefinite *dicta,* the decision law did not recognize *Notice* as such an element that would defeat the title of a holder for value.

To illustrate, Lord Herschell, in *London Joint Stock Bank v. Simmons, App. Cas. 219,* at page *221,* is quoted by the respondent at page 29 of its brief in this case, as saying:

> "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments."

Well, all we can say is, that if the distinguished Lord had lived for a decade after saying thus, he would have learned that the doctrine of *Notice* had become a part of the statute Negotiable Instrument law adopted in many of the states.

V.

The respondent is also seeking to becloud the issue by claiming that the questions of forgetting and negligence are involved, and that negligence and forgetting do not constitute in law bad faith.

We have made no such contention as this bogey man that the respondent has set up.

The respondent is further departing from the truth and logic in asserting that we claim that negligence or lack of memory enter into the definition of Bad Faith as applied to the facts in this instant case. Here the bad faith arises from the fact that the respondent "as an established office custom ignored the delivery of the notice of the bonds having been stolen." (Res. brief, in heavy type, top of page 26.)

As we stated in our original brief, it is not a case of forgetting, because one can never forget what it never knew; nor is it a case of negligence, because of such lapse of memory.

It is a case of deliberately resolving that

> "I will instruct my office assistants to close their eyes to, and never consult mail which by any possibility will disclose that bonds which may later be presented to me have been acquired by the proposed seller by theft."

That is what Master In Chancery Allen found to be the facts (R. 88). And that was the finding of the District Court (R. 107-108). Its tenth finding is partly a fact, and partly a law finding, *i. e.*, the fact finding that the respondent at and before the aforesaid purchase of bonds had received actual notice that the same had been stolen from the Petitioner, Graham, etc., and, the conclusion of law at the end of said 10th finding is

> "that the failure and neglect of said respondent to observe and learn the contents of such notice prior to the purchase of the securities here involved must be considered as amounting to a wilful disregard of the rights of the true owners of said securities, the said Richey V. Graham, petitioner herein" (R. 109).

The conclusions of law of the District Court are manifestly correct. That is to say

(4) That the claim of the White-Phillips Co., in and to said securities is subject to and will be determined by and according to the provisions of said *Negotiable Instruments law of Illinois.*

(5) That the respondent, The White-Phillips Company, Inc. by reason of having actually received, prior to its purchase of the securities here involved, a notice that the same had been stolen as hereinabove set forth, did not, by the purchase of said bonds, become a holder thereof in due course, but that at such time the said respondent had knowledge of such facts that its action in taking such securities amounted to bad faith.

(6) That the equities in this cause are with the respondent Richey V. Graham, and a decree should be entered accordingly (R. 109-10).

These findings, and particularly the 10th fact and the 6th and final conclusion of law, amount to a pronouncement by the Court that under the undisputed facts in the case the equities are with the Respondent Graham, and a decree should be entered accordingly.

The Circuit Court of Appeals found the facts essentially the same as the Court and Master below, its particular finding being

> "There were no directions to the employes as to the handling of them (notices) and no settled policy was pursued in bringing such notices to the attention of the office; nor were tabulations or records kept of such lists; nor were they examined before bonds were purchased. No employe was instructed to note, record or circulate the contents of the lists" (R. 145).

The statement of the respondent, White-Phillips Co., on the first page of its brief, that our statement of the case, supplemented by that of the Court of Appeals seems sufficient, and that the facts are correctly stated by the trial Court in the findings of fact, is most significant, and places the case on all fours with the facts upon which the *Northwestern Nat. Bank v. Madison & Kedzie State Bank, supra,* was decided by the Illinois Appellate Court, with the affirmance of the judgment by the Supreme Court by virtue and by reason of its denial of the writ of *certiorari.*

VI.

The Respondent unintentionally entirely misapprehends the effect of the ruling in *National Bank v. Uptown State Bank, 273 Ill. App. 401,* in its comment thereon in its brief at pages 8, 14, 34, 36 and 60. If that case went as far and meant all that counsel claim for it, it would have little, if any, weight so far as concerns the case of *Northwestern Nat. Bank v. Madison & Kedzie State Bank, supra,* as the latter case has all the dignity of an Illinois Supreme Court decision by reason of the Supreme Court's having by its denial of a writ of *certiorari,* affirmed the conclusion and the judgment reached by the Appellate Court.

It is interesting to note that the proviso in *Section 17 of the Appellate Court Act (Par. 49, Chap. 37, Cahill's Illinois Statutes, 1933)* to the effect that the opinions of the Appellate Courts should not be of binding authority in any cause or proceeding other than in that in which they may be filed, was omitted by amendment adopted at the last session of the General Assembly *(Par. 49, Chap. 37, Cahill, 1935; Session Laws 1935, P. 696).*

This *Uptown State Bank case* that the respondent relies upon was an action of trover for the conversion of five

bonds of $1,000.00 each, which had been stolen from the plaintiff (National Bank of the Republic). Typewritten notices of such theft were mailed out on behalf of the plaintiff "but the evidence does not show specifically that a copy was mailed to defendant" (Opinion 405). Later the bonds came into the hands of one Farry, the president of Fidelity Motors Company, and using said bonds as collateral he obtained a loan to said company in the sum of $3,980.00 from defendant bank, the amount thereof being placed on the books of the defendant to the credit of said Fidelity Motors Company. But before any said fund was checked out the defendant learned of the theft. Later, however, the defendant honored checks drawn by the borrower and paid out the said fund. The holding was that since the defendant at the time it received express notice of the theft had paid out nothing, it was not then a holder in due course, and second, that the defendant could acquire no greater rights by its subsequent payment.

And the Appellate Court definitely shows, by the final paragraph in the decision *(408)*:

> "Finding of fact: We find as a fact that defendant, having in its possession the proceeds of the loan of $3,980, and the four bonds at the time it was notified that the bonds were stolen, is not a holder in due course of the bonds,"

that that cause turned on the interpretation of facts different than those in the instant case. Nevertheless, here again is another expression of a Court of Appeal in Illinois to the effect that where the proof has been made of a definite notification of bonds having been stolen, the holder of stolen bonds ceases thereby to be a holder in due course to the extent of the bonds or the proceeds of the bonds in its hands not yet disposed of. It is a deci-

sion which absolutely sustains the notice feature of *Section 54* and we feel warranted in saying that if the losing party had sought a writ of *certiorari* from the Supreme Court and the Supreme Court had denied the writ, such denial would be an affirmance of the judgment and of the conclusion that the Appellate Court reached with reference to *Section 54*, as applied to the finding of ultimate fact that the Appellate Court made, which is on page *408* of the opinion. The suggestion about the cashier of the bank having, when he accepted the bonds as collateral, acted in good faith, was not necessary to the decision of the case, because, while there was a question as to whether or not the notice sent out by the Illinois Bankers Association on April 4, 1930, was received by the Uptown State Bank, it definitely appears by the evidence and was not in dispute, that on July 2, 1930, the Guaranty Trust Company of New York notified the Uptown State Bank that the bonds had been stolen and the Guaranty Trust Company refused to accept the bonds from the Uptown State Bank who had shipped them to New York for redemption at 105, and returned them to the Uptown State Bank because of their being stolen bonds.

So, we submit, that a close study of the facts and law involved in the reversal of the judgment of the trial Court, adds the ruling in *Nat. Bank v. Uptown State Bank, supra*, to those definitely favorable to your petitioner's contention as to the purpose and effect of provisions as to Notice contained in the *Illinois Negotiable Instruments Law.*

The point, as we view it, is, that the question involved is admittedly a matter of the statutory law of Illinois and the meaning of that statute has been expressly declared by the highest Court of the State which has ever

had occasion to pass thereon. And the respondent is now asking the United States Supreme Court to construe the statutory law of Illinois directly contrary to the construction which has been given by the highest Court of this State which has ever had occasion to pass thereon.

And regardless of the general rule relating to denial of *certiorari*, the fact still remains that in this particular case, as the record shows, the Illinois Supreme Court denied a *certiorari* where absolutely the only point involved in the petition therefor was the effect of notice of the precise character involved in this case. In view of this record it would seem that until the Supreme Court of Illinois indicates to the contrary, the rule laid down by the Appellate Court in the *Madison and Kedzie State Bank case* ought to be controlling.

VII.

As to the fallacious reasoning leading to the citation by the respondent of other cases reviewed in Illinois we submit the following comment:

Drouineau v. First National Bank, 244 Ill. App. 251, is a case which we cited in our original brief to sustain our proposition that under the *Negotiable Instruments Law* of Illinois notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he pays for the same will defeat his claim to being a holder in due course, and likewise as stated in *Section 56* of the same Act that to constitute notice of defect the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

The Court held in that case that the notice had not been given and the knowledge had not been acquired, but it bears out our contention that the wording of the statute is unambiguous and means what it says.

Nowhere within the four corners of this case does it sustain the proposition that the statute is merely declaratory of the common law as claimed on pages 3 and 4 of respondent's brief.

The case of *Chicago Auto Sales Company v. Peters, 221 Ill. App. 363,* likewise cited by respondent on page 4 of its brief, does not bear out respondent's claim. The case sets forth the sections of the *Illinois Negotiable Instruments Law* in the same manner that we have repeatedly set it out, and to that extent it bears out our theory and would be a proper citation for this petitioner.

On the merits of the case, the Court decided that the defendant corporation was equitably estopped from contesting the validity of the notice. In no way does the decision aid the point respondent urges.

Crouch v. National Bank, 156 Ill. 342, 357, cited by respondent at page 23 of its brief, has not the remotest bearing on the questions involved in this suit. The Court held that the words, "paid in" contained in an affidavit which was the subject of review were sufficient, the Court saying:

> "We are unable to see that the addition of the words 'in good faith' in this affidavit, would have done more than emphasize what was in fact stated. The affidavit, as made, could not have been true if the contribution of $50,000 was merely colorable."

Cramer v. Burkhalter, 207 Ill. 34, cited on page 13 of respondent's brief, properly holds that whether or not a notice had been given was a question of fact.

City of Decatur v. Besten, 169 id. 340, cited on the same page, is a similar holding.

Peterson v. Emery, 154 Ill. App. 294, and *Knolt v. Cartwright, 202 id. 502*, in no way apply to or sustain respondent's contention, but all the foregoing cases sustain the interpretation of the *Illinois Negotiable Instruments Law* that the Courts of our state uniformly accord it, being also the construction we contend for.

C. R. I. & P. Ry. Co. v. Hamler, 215 Ill. 525, is a willful and wanton negligent case, which holds that "in negligence, merely, there is no intention to do a wrongful act or omit the performance of a duty."

As we view it, the facts in the finding of the District Court show, and the District Court held, that the conduct of the respondent amounted to a willful and conscious disregard of the rights of the true owners of the said securities (Rec. 109).

We submit that "the delivery of the notice of stolen bonds and the ignoring of it by an established office custom," which is the characterization which the respondent gives to its own conduct (its brief 26) shows an intention to wrong the real owners of the securities and to omit the performance of a duty, to-wit, to obey the statute as to the effect of notice.

We regard it as an unnecessary involvement of the attention of the Court to join with the respondent in a discussion of the reasoning or applicability of British or

American cases which were decided long before the passage of the *Illinois Negotiable Instruments Law.*

VIII.

It is obvious that the respondent has attempted in his brief to read out of the *Negotiable Instruments Statute* all provisions making the giving of notice, sufficient to defeat the claim of one subsequently obtaining a security of being a holder in due course.

Its counsel attempts to emasculate the act in such a manner that *Section 52* will be held repugnant to *Section 56*, and therefore of no legal effect, and have the Court hold that that Section requires that the purchaser of a security must have actual knowledge at the time he pays over the money, and that he be then conscious of the fact, that his action in taking the instrument amounts to bad faith, in order to disqualify him as a "holder in due course".

While our position is, that the plain reading and intent of the statute is that the giving of a notice that a definite infirmity or defect in title, set forth in such notice, exists, thereby puts the receiver of such notice in actual knowledge of such facts that his action in taking the instrument amounts to bad faith. Statutes are enacted in the hope that thereby evils and hardships may be avoided, even though under existing law or custom or Court holdings those hardships have theretofore been accorded the dignity of recognized legality.

Respectfully submitted,

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October, 1935.